No. 03-710

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IN THE SUPREME COURT OF THE UNITED STATES

GERALD DEVENPECK AND JOI HANER, *Petitioners,*

v.

JEROME ANTHONY ALFORD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA EX REL. BILL LOCKYER, ATTORNEY GENERAL, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does an arrest violate the Fourth Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense which the officer subjectively believed to be the basis for the arrest?

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INTEREST OF AMICUS CURIAE

California urges this Court to grant certiorari and reverse the Ninth Circuit Court of Appeals decision in *Alford v. Haner*, 333 F.3d 972 (9th Cir. 2003). In *Alford*, the Ninth Circuit permitted an arrestee to bring suit against Washington police officers for arresting him on the basis of their mistaken belief that he had violated a law prohibiting the tape recording of private conversations, despite the existence of probable cause to believe that the arrestee had committed another, unrelated offense. In contrast, California law properly interprets the decisions of this Court to render immaterial the actual, articulated motivations or beliefs of the arresting officer, so long as probable cause otherwise exists to arrest a suspect, even for an unrelated offense. California's interest in the protection of its citizens and the prosecution of crime suffers a chilling effect under the Ninth Circuit's erroneous ruling in *Alford*. Accordingly, California has a solemn duty to seek its correction.

SUMMARY OF ARGUMENT

In *Alford*, the Ninth Circuit permitted the mistaken, subjective beliefs of the arresting officer to invalidate an arrest, despite the existence of probable cause to believe the suspect had committed another offense. In denying the officers' claim of qualified immunity, the court set out what it referred to as "the test applied in the Ninth Circuit": "probable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Alford*, 333 F.3d at 976. Under this doctrine, if both offenses are not closely related, the officer's mistaken belief–even if made in good faith and supported by the judgment of a deputy prosecutor, as here–will expose him to civil suit under 42 U.S.C. § 1983.

The Ninth Circuit is wrong. No decision of this Court has ever held that arresting a person for the wrong offense is lawful only where probable cause exists for a "closely related" offense. Indeed, such a doctrine is plainly contrary to the recent decisions of this Court, which have steadfastly refused to consider the actual motivations or beliefs of the arresting officer. No degree of relation at all is required between the offense that motivates the officer to arrest and the offense for which probable cause actually exists.

California cases have properly interpreted the decisions of this Court to disavow any inquiry into the actual, subjective beliefs of the arresting officer. Under the Ninth Circuit's ruling in *Alford*, however, California peace officers face civil liability for properly following this Court's decisions and the decisions of our state courts. California therefore asks this Court to grant the writ in order to extinguish the "closely related offense" doctrine and reverse the Ninth Circuit's finding of liability against the Washington police officers who properly arrested Alford.

REASONS FOR GRANTING THE PETITION

In *Alford*, the Ninth Circuit permitted the mistaken, subjective beliefs of the arresting officer to invalidate an arrest, despite the existence of probable cause to believe the suspect had committed another offense. The Ninth Circuit based its conclusion on the following "closely related offense" doctrine: "probable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Alford*, 333 F.3d at 976. However, this doctrine is not found in any decision of this Court and plainly ignores this Court's recent decisions, which have refused to consider the actual motivations or beliefs of the arresting officer. No degree of relation is required between the offense that motivates the officer to arrest and the offense for which probable cause actually exists.

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT ON AN IMPORTANT ISSUE INVOLVING THE PROPER STANDARD FOR A LAWFUL ARREST

The Ninth Circuit decision below squarely conflicts with this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996). In *Whren*, vice-squad officers patrolling a "high drug area" stopped a car after witnessing suspicious behavior by its occupants. *Id.* at 808. When an officer approached the car, he saw two large plastic bags of crack cocaine in the hands of Whren, the passenger. *Id.* at 808-809. At trial, Whren challenged the legality of the stop under the Fourth Amendment. *Id.* at 809-810. Whren claimed that, even though the officers had probable cause to stop the car for traffic violations, those reasons were a pretext for the actual, subjective motivation behind the stop–the investigation of drug activity–for which the

officers lacked probable cause. *Id.* at 810. Whren asked this Court to consider the actual motivation behind the traffic stop and invalidate it when the articulated motivation could be shown to be a pretext. *Id.* at 808, 811.

In a unanimous decision, this Court rejected Whren's argument, explaining that an officer's actual motive cannot invalidate objectively justifiable behavior. *Whren*, 517 U.S. at 812. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. So long as the officer's action is supported by objective circumstances, the officer's "state of mind" is irrelevant.[1] *Id.* Stated another way, "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814. Accordingly, the stop at issue was validated by the presence of probable cause to support the traffic violations, regardless of the actual motivations of the officers. *Id.* at 819.

Five years later, in *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001), this Court forcefully reiterated *Whren*'s holding. In a per curiam opinion, this Court reversed an Arkansas Supreme Court's invalidation of an arrest on the basis of an officer's "improper subjective motivation." *Id.* at 772. Again, this Court disapproved any consideration of the arresting officer's "actual motivations" within Fourth Amendment analysis. "The Arkansas Supreme Court's holding . . . cannot

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1. The *Whren* decision did note that inventory searches and administrative inspections fall outside this rule because both are conducted in the absence of probable cause. *Whren*, 517 U.S. at 811-12. The decision also noted that the selective enforcement of law on the basis of race, for example, would be an exception to this rule, though such a claim would be brought under the Equal Protection Clause, not the Fourth Amendment. *Id.* at 813. Neither exception applies to the instant case.

be squared with our decision in *Whren*, in which we noted our 'unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers,' and held unanimously that '[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.'" *Id.* at 771-772. Moreover, the *Sullivan* decision clarified that it "is of no particular moment" that "*Whren* involved a traffic stop, rather than a custodial arrest." *Id.* at 772. Thus, *Whren*'s rule applies equally to arrests.

In the decision below, however, the Ninth Circuit ignored the dictates of *Whren* and *Sullivan*. The Ninth Circuit invalidated the arrest of Alford on the basis of Sergeant Devenpeck's erroneous belief that Alford had violated a state law prohibiting the taping of private conversations, despite the clear existence of probable cause that Alford had violated a state law prohibiting the impersonation of a police officer.[2] In the Ninth Circuit's view, the subjective belief of the arresting officer can void the lawfulness of an arrest despite the objective

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2. Washington law provides, in pertinent part:

> A person is guilty of criminal impersonation in the second degree if the person:
> (a) Claims to be a law enforcement officer or creates an impression that he or she is a law enforcement officer; and
> (b) Under circumstances not amounting to criminal impersonation in the first degree, does an act with intent to convey the impression that he or she is acting in an official capacity and a reasonable person would believe the person is a law enforcement officer.

Wash. Rev. Code § 9A.60.040.

presence of probable cause. This is plainly contrary to *Whren* and *Sullivan*.

Indeed, the Ninth Circuit's definition of probable cause reveals the symptom of its misunderstanding. *Alford* incorrectly defines probable cause as follows: "Probable cause exists when an officer has a reasonable belief that a crime has been, is being, or is about to be committed." *Alford*, 333 F.3d at 976. This definition is incorrect because it creates an erroneous subjective component by requiring an arresting officer to actually possess a "belief" concerning the existence of certain facts. Though the qualifier "reasonable" makes clear that *Alford* sets out an objective requirement as well, that component is in addition to the erroneously imposed subjective standard.

The infirmity of the Ninth Circuit's definition appears less subtle when one considers a proper definition of probable cause, as set out by this Court: "the objective inquiry [is] whether a reasonable officer *could have believed*" that a crime had occurred. *Wilson v. Layne*, 526 U.S. 603, 615 (1999) [italics added]. The use of the phrase "could have believed" correctly avoids reference to the arresting officer's actual state of mind and instead focuses on the objective presence of facts, be they known or unknown, or their legal significance understood or misunderstood. The vantage point is a hypothetical officer: "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Maryland v. Pringle*, 124 S.Ct. 795, 800 (2003); *accord Thompson v. Keohane*, 516 U.S. 99, 112 (1995) ["the court must apply an objective test"]. Whether the arresting officer actually holds a certain view of those facts is immaterial.

Rather than simply asking whether the objective facts of the case supported probable cause, the *Alford* Court further erred by applying its version of the "closely related offense" doctrine to the facts of the case, stating that "[p]robable cause may still exist for a *closely related* offense, even if that offense was not invoked by the arresting officer, as long as it involves the *same conduct* for which the suspect was arrested." *Alford*, 333 F.3d at 976 [italics in original]. Noting that an impersonation charge would have been based on conduct unrelated to the mistaken tape recording charge, the Court found that the "closely related offense" standard was not met here. *Id.*

The Ninth Circuit is again mistaken. The Ninth Circuit's "closely related offense" doctrine finds no basis in any of this Court's decisions and nowhere appears in any controlling authority from this Court. In *Alford*, the Ninth Circuit refers to it as "the test applied in the Ninth Circuit" and cites its own prior decision in support of the doctrine. *Alford*, 333 F.3d at 976, *citing Gasho v. United States*, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994). However, *Gasho*, like other circuit court decisions citing the "closely related offense" doctrine, cannot trace it to any decision by this Court. Indeed, whatever the basis for the doctrine, that basis cannot be reconciled with *Whren* or *Sullivan*. The arrest in *Whren* was valid despite the fact that the traffic violations, for which probable cause existed, were in no way related to the drug offenses, for which probable cause was lacking. Likewise, the vehicle code violations in *Sullivan*, for which probable cause existed, were in no way related to the drug offenses, for which probable cause was lacking. Yet the arrest in *Sullivan* was also proper under the Fourth Amendment. In neither decision did the lack of a close relation between the offenses render the arrest invalid. Accordingly, the lack of a close relation between the supposed tape recording offense and the impersonation offense should not invalidate the instant arrest. The present case affords this Court the opportunity to extinguish this faulty doctrine.

II.

THE NINTH CIRCUIT'S DECISION ALSO CONFLICTS WITH CALIFORNIA LAW, AND THEREBY EXPOSES CALIFORNIA PEACE OFFICERS TO CIVIL LIABILITY DESPITE CALIFORNIA'S PROPER CONFORMITY TO THE LEGAL PRECEDENT OF THIS COURT

The *Alford* decision also conflicts with California law. California law properly recognizes that the *Whren* decision both eliminated any consideration of the arresting officer's actual beliefs as to probable cause and also vanquished any requirement of a close relationship between the offense supported by probable cause and the offense lacking in probable cause.

In *People v. Rodriguez*, 53 Cal.App.4th 1250, 1262 (1997), a California appellate court considered a case in which there was no probable cause to arrest a defendant for one murder, but there was probable cause to arrest him for a second murder. The court held that so long as probable cause supported the defendant's arrest for the second murder, it was immaterial that the officer may have arrested the defendant on the basis of his mistaken belief that probable cause existed for the first murder. *Id.* In reaching its conclusion, the *Rodriguez* court found that *Whren* had foreclosed any consideration of the subjective intent of the arresting officer:

> As noted by the *Whren* court, the test is not whether a reasonable officer would have made the arrest for the reasons given. . . . [W]hether [the officer] believed he was arresting defendant only on the [first murder] or on both [murders], the arrest was valid because it was supported by probable cause to believe defendant had committed *a* homicide.

Id. at 1266. The officer's belief, noted the court, is not part of the test for probable cause. *Id.* Significantly, the *Rodriguez* court also found it "irrelevant" whether the two murders were related. *Id.* at 1267.

Since *Rodriguez*, other California cases have properly held that, so long as probable cause exists to support an arrest for some crime, the arresting officer's mistaken belief as to the presence of probable cause for a certain crime is immaterial. *See In re Justin K.*, 98 Cal.App.4th 695, 699 (2002) [the officer's subjective understanding of the law does not invalidate a detention so long as the officer's conduct is objectively reasonable]; *People v. White*, 107 Cal.App.4th 636, 641 (2003) [same]. These cases properly conform to the decisions of this Court.

However, the conflict between California and the Ninth Circuit on this issue of Fourth Amendment law exposes California peace officers to the potential of civil liability for properly following this Court's precedent. The facts of *Alford* aptly demonstrate this danger. There, as the dissent points out, Washington state patrol officers were clearly doing their job to protect the public. *Alford*, 333 F.3d at 979. The officers properly investigated Alford after he had activated his wig-wag lights at a stranded car at night in "dark and deserted" area. *Id.* at 974-975. The occupants of the stranded car believed Alford to be a police officer. *Id.* at 974. After contacting Alford, officers found him to be in possession of handcuffs, a microphone, a radio that was broadcasting the communications of the local Sheriff's office, a police scanner and tape recording equipment. *Id.* at 975. Alford's possession of these items was "ominous," to say the least, as the dissenting opinion noted. *Id.* at 979. It cannot be doubted that probable cause existed to arrest Alford for impersonating a police officer. By arresting Alford, the officers were doing their job to protect the public. Clearly, the jury agreed because it found in favor of the officers

after Alford sued, notwithstanding a jury instruction explaining that clearly established state law did not bar the type of recording for which Alford was arrested. *Id.* at 974, 979.

It is troubling that the Ninth Circuit would disregard the jury's verdict, in addition to the exercise of the district court judge's discretion, by reversing the denial of Alford's motion for a new trial. *Alford*, 333 F.3d at 974. The Ninth Circuit's advancement of such a lawsuit, especially when there was no suggestion of bad faith or improper motives on the part of the officers, has disturbing implications for California peace officers as well.

The Washington state patrol officers in this case were doing their job to protect the public. The Ninth Circuit's decision in *Alford* frustrates that effort. The *Alford* decision contravenes the precedent of this Court and conflicts with California decisions that properly follow that precedent. This Court should grant the writ and reverse the decision of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court grant the petition for certiorari filed by the State of Washington.

Dated: February 6, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Patrick J. Whalen, a member of the Bar of this Court, hereby certify that on this 6th day of February 6, 2004, a copy of Amicus Curiae Brief Of The State Of California Ex Rel. Bill Lockyer, Attorney General, In Support Of Petitioner, in the above-captioned case was mailed, via first class postage prepaid, in the United States Postal Service to:

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All persons required to be served have been so served.

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